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No. 82-164

In the Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR J. FELICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Court of Claims[1] erred in dismissing his claim for damages arising out of (1) his removal from his position as a part-time United States magistrate and (2) the failure to appoint him to a newly-created position as a full-time United States magistrate.

1. Petitioner served as a part-time United States magistrate in the Eastern District of Washington by appointment of the local United States District Judges under the rules set by the Judicial Conference of the United States, 28 U.S.C. 631 (Pet. App. A1-A2). Following his original appointment as a part-time United States commissioner in

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[1]The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which became effective on October 1, 1982, abolished the Court of Claims and transferred its jurisdiction to the United States Court of Appeals for the Federal Circuit.

1956, petitioner served successive 4-year terms as commissioner and then as magistrate when the job title and duties were changed by law. His final reappointment was on January 24, 1979 (*ibid.*). Because the part-time position was converted to full-time status by the Judicial Conference, petitioner's final appointment expired by its terms on January 31, 1983, or upon the appointment of a full-time magistrate (*ibid.*).

Petitioner was a candidate for the full-time position, but on May 7, 1979, Chief Judge Marshall A. Neill notified him that another person had been selected (Pet. App. A3). Petitioner responded by letter dated May 9, 1979 (*id.* at A3, K1-K12), stating: "[I]t is with the deepest regret and sadness that I hereby submit my resignation, effective immediately, as the United States Magistrate" (*id.* at K11). He added that if Chief Judge Neill reconsidered, or if the selectee declined the office, petitioner would discuss the matter further and would "remain available to serve if called upon, as I have dedicatedly and loyally served for twenty-two years" (*id.* at K11-K12).

On May 15 1979, the Administrative Office of the United States Courts sent a Form 250, Notification of Personnel Action, to Chief Judge Neill, with a copy to petitioner, formalizing the resignation as of May 9. Thereafter, the position was treated as vacant (Pet. App. A4-A5). Since the vacancy created an emergency, the selectee for the full-time position was appointed to fill the remaining term of the part-time position and took office as the full-time magistrate on June 4, 1979 (*id.* at A5).

Petitioner brought suit in the United States Court of Claims, seeking damages for (1) improper removal from his part-time magistrate position and (2) the failure to appoint him to the newly-created full-time magistrate position. The court granted the government's motion for summary judgment (Pet. App A1-A8). First, the court ruled

that petitioner's May 9, 1979, letter was plainly a tender of resignation (*id.* at A5), and the court viewed petitioner's failure to correct the administrative office when it notified him that his resignation had been recorded as additional support for that interpretation (*id.* at A5-A6). Since petitioner had resigned, the court concluded, he could not "claim the emoluments of the part-time position for the brief time it continued to exist" (i.e., from May 9, 1979, the date of his resignation until June 4, 1979, when the full-time term began) (*id.* at A6). Second, the court held that sovereign immunity barred petitioner's damages claim for the failure to appoint him to the full-time position because Congress had not consented to such a suit (*id.* at A7). Relying upon *United States* v. *Testan*, 424 U.S. 392 (1976), the court noted that the Back Pay Act, 5 U.S.C. 5596, does not constitute such consent because it "did not confer entitlement to the pay of a position to which one was never appointed" (Pet. App. A6).

2. The decision of the Court of Claims is correct and does not conflict with any decision of this Court or of any court of appeals. Further review by this Court is therefore unwarranted.

a. Petitioner contends (Pet. 14-17) that the Court of Claims erred in granting summary judgment with respect to his claim for damages for the period from May 9 to June 4, 1979, because a genuine question of material fact existed as to whether his letter of May 9, 1979, was a resignation and, if so, whether it was obtained under duress. Petitioner's argument is erroneous and, in any event, this insignificant issue does not merit this Court's review. The Court of Claims correctly found the letter to be a tender of resignation (Pet. App. A5), relying upon not only the unequivocal language but also petitioner's failure to correct the subsequent administrative notice of his resignation (*id.* at A5-A6). Summary judgment was proper because petitioner's

letter may not reasonably be construed otherwise. And while petitioner claimed that he wrote the letter while in an emotionally charged state of mind (*id.* at J13-J16), he never explained why he did not attempt to correct the administrative notification of his resignation, which occurred one week later when he presumably was in a calmer mood.

Moreover, petitioner's final appointment as part-time magistrate expired by its terms upon the appointment of a full-time magistrate (Pet App. A2, B3). Accordingly, the appointment of the full-time magistrate on June 4, 1979, would have terminated petitioner's part-time position in any event. Thus, petitioner's resignation on May 9, 1979, merely advanced the termination of his part-time position by 26 days.

b. Petitioner next contends (Pet. 18-25) that the court below improperly dismissed his claim for damages for the failure to appoint him to the full-time position. Petitioner argues (*id.* at 30-33) that the Tucker Act, 28 U.S.C. 1491, provides jurisdiction for that claim, first, because the claim was based upon a contract implied in fact and, second, because it was based upon the Due Process Clause of the Fifth Amendment and various federal statutes and regulations.

While the Tucker Act does confer jurisdiction for "any claim against the United States founded * * * upon any express or implied contract with the United States," (28 U.S.C. (& Supp. IV) 1491) United States magistrates clearly serve by appointment, not by contract. 28 U.S.C. 631(a) expressly states that the "judges of each United States district court * * * shall *appoint* United States magistrates" (emphisis added), and petitioner concedes (Pet. 19) that "[a] magistrate is subject to appointment." Thus, there is no substance to petitioner's contract argument. See *Army &*

Air Force Exchange Service v. *Sheehan*, No. 80-1437, slip op. 7-10 (June 1, 1982); *United States* v. *Hopkins*, 427 U.S. 123 (1976).

There is also no merit to petitioner's argument that his claim was incorrectly dismissed because it was founded upon the Due Process Clause and various federal statutes and regulations. This Court has repeatedly "rejected the argument that 'the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages' " (*Army & Air Force Exchange Service* v. *Sheehan*, *supra*, slip op. 11, quoting *United States* v. *Testan*, 424 U.S. 392, 401 (1976); see also *United States* v. *Hopkins*, *supra*, 427 U.S. at 130). Rather, an asserted entitlement to money damages can succeed only if a provision of federal law waives sovereign immunity by expressly authorizing such relief. *Army & Air Force Exchange Service* v. *Sheehan*, *supra*, slip op. 11; *United States* v. *Testan*, *supra*, 424 U.S. at 400. Neither the Due Process Clause, which was also invoked by the plaintiffs in *Sheehan* (see slip op. 4) and *Hopkins* (see 427 U.S. at 130), nor the other provisions upon which petitioner relies can be fairly interpreted as mandating the payment of damages by the United States. Thus, they do not constitute waivers of sovereign immunity. Accordingly, petitioner's damages claim based upon those provisions was properly dismissed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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